

STATE OF MICHIGAN
COURT OF APPEALS

In the Matter of JASON LAMARR PINKSTON,
JR., Minor.

DEPARTMENT OF HUMAN SERVICES,

Petitioner-Appellee,

v

JASON L. PINKSTON, SR.,

Respondent-Appellant.

UNPUBLISHED
March 20, 2007

No. 273172
Saginaw Circuit Court
Family Division
LC No. 05-030124-NA

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Respondent appeals as of right from the trial court order terminating his parental rights under MCL 712A.19b(3)(c)(i), (g), (h), and (j). We affirm.

I. FACTS

Respondent has been incarcerated in the Milan Federal Correctional Institution since June 2005, for distribution of five grams or more of cocaine. The petition for termination of respondent's parental rights, filed in December 2005, stated that termination was requested because respondent never established paternity, had a criminal history, was incarcerated until 2014, and had not provided for the child. Respondent appeared by telephone at the first hearing, and was appointed counsel by the trial court. At the second hearing, respondent failed to appear by telephone because the federal prison did not cooperate. Citing respondent's failure to establish paternity of the child, the court-appointed attorney was granted permission to withdraw from the case. Respondent's request for a second chance to participate in the proceedings was granted in May 2006, but he again failed to participate by telephone in the termination trial, due to the federal prison. Respondent's counsel¹ told the trial court that she could proceed in respondent's absence. Termination of respondent's parental rights was granted because, due to

¹ This was respondent's second court-appointed attorney.

respondent's incarceration, he could not provide proper support for the child, visit the child, or participate in a treatment plan. Additionally, respondent did not offer an alternative care plan.

II. DUE PROCESS & TERMINATION OF PARENTAL RIGHTS

Respondent does not argue that the trial court erred in finding that the statutory grounds for termination were established by clear and convincing evidence, but instead argues that his rights to due process and confrontation were violated when the trial court proceeded without his appearance by telephone after arrangements with the federal prison in which he was incarcerated were not successful. We disagree.

A. Standard of Review

Unpreserved, constitutional error is reviewed under the plain error rule. "To avoid forfeiture under the plain error rule, three requirements must be met: 1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Further, this Court reviews decisions terminating parental rights for clear error. Clear error has been defined as a decision that strikes this Court as more than just maybe or probably wrong. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). The trial court's findings of fact may not be set aside unless they are clearly erroneous, and this Court shall give regard to the trial court's special opportunity to judge the credibility of witnesses who appeared before it. *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989).

B. Analysis

We find that the trial court did not commit plain error by proceeding with the termination hearing in the absence of respondent's appearance by telephone.

This Court addressed the issue of whether a respondent incarcerated in another state is required to be present for a termination of parental rights hearing in *In re Vasquez*, 199 Mich App 44; 501 NW2d 231 (1993). Here, respondent was not imprisoned in another state, but was in a federal prison located in Michigan. *Vasquez* is analogous, however, because of the trial court's lack of authority over a federal facility. In *Vasquez*, the respondent was incarcerated in Texas and did not appear for the trial at all. *Id.* at 47. After applying the *Mathews* balancing test, the *Vasquez* court found that the respondent's due process rights were not violated where he could have appeared by telephone, among other mediums, and he was well represented by counsel. *Id.* at 47-49. The *Mathews* balancing test is as follows:

[I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official actions; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional, or substitute procedural requirement would entail. [*Mathews v Eldridge*, 424 US 319, 335; 96 SCt 893; 47 L Ed 2 18 (1976).]

This Court has well acknowledged that the interest affected by parental termination hearings is an important one. *Vasquez, supra* at 47; *In re Render*, 145 Mich App 344, 347; 377 NW2d 421 (1985). Regarding the second prong of the test, the trial court's attempts to have respondent appear by telephone were not successful. However, respondent was represented by counsel who had spoken to him and was aware of his position on the petition to terminate. Counsel also stated that there was no reason that she could not proceed in respondent's absence. There was little risk of an erroneous deprivation of such interest through the procedures used because of counsel's statements.

Lastly, the trial court could have continued the matter and attempted again to secure respondent's appearance by telephone. However, the trial court had informed the federal prison of its intent to hold proceedings on that date and time and made all possible arrangements for respondent's appearance by telephone and still he was not available. Additionally, respondent's presence by telephone at other hearings was random despite every attempt to arrange for his appearance with prison officials. Because of this history of unreliability, there was no reason to believe that a continuance would have secured respondent's presence by telephone. Therefore, the trial court did not violate respondent's due process rights by proceeding with the termination hearing in his absence.

Further, respondent's right to confrontation was not violated because he had no right to confrontation in a child protection proceeding. *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993).

Respondent also argues that the trial court improperly took jurisdiction in this matter. The order finding jurisdiction was not directly appealed, however, and cannot be challenged in the context of this appeal. *In re Hatcher*, 443 Mich 426, 444; 505 NW2d 834 (1993). In any event, in taking jurisdiction, the trial court provided notice to respondent and found that the child's mother's neglect of the child was the basis for asserting jurisdiction. Once jurisdiction is established, the trial court can make determinations against any adult. MCR 3.973(A).

Affirmed.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Bill Schuette